No. 9019

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LYON COUNTY BANK MORTGAGE CORPORATION (a corporation),

Appellant,

vs.

W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada (a National Banking Association),

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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the United States for the District of Nevada, appealed from, was affirmed.

That in affirming said judgment this court inadvertently omitted to consider certain points of law and fact presented by the appellant on said appeal, which if given due consideration would have required the reversal of said judgment, with or without order for new trial.

That in affirming said judgment this court inadvertently adopted the findings of fact and conclusions of law of the trial court, except for one modification leaving the matters thus adopted as adjudicated, precluding further litigation to clarify the same, whereas the matters thus found and adjudicated are erroneous.

And in this connection appellant further represents and shows, as follows:

Speaking of the collateral security furnished by Lyon County Bank July 22, 1931, this court in its opinion, says:

> "The security thus provided was not, as to subsequently accruing interest or otherwise, diminished or impaired by Lyon Bank's insolvency or by the action of the examiner in taking possession of its property and business. Ticonic National Bank v. Sprague, 303 U. S. 406,411."

The opinion fails to give effect to Section 53 of the Nevada Bank Act of 1911, Nevada Compiled Laws, Section 702, which prohibits a "lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of the assets

of the bank whose property and business the examiner shall have taken possession * * *'' and the court accounts for this failure by stating:

> ''There is, apparently, no pertinent Nevada decision. Lacking such, we apply the rule of Ticonic National Bank v. Sprague, supra.''

In the footnote to this part of the opinion this court lists the cases cited by appellant on the point under consideration, as follows:

> ''State v. Parkinson, 5 Nev. 15; State v. Wildes, 37 Nev. 55, 139 P. 505, 142 P. 627; Gill v. Paysee, 48 Nev. 12, 226 P. 302; Tonopah Sewer & Drainage Co. v. Nye County, 50 Nev. 173, 254 P. 696; Organ v. Winnemucca State Bank & Trust Co., 55 Nev. 72, 26 P. 2d 237; Lyon County Bank v. Lyon County Bank, 57 Nev. 41, 60 P. 2d 610; Dellamonica v. Lyon County Bank Mortgage Corp., ... Nev. ....., 78 P. 2d 89; Crystal Bay Corp. v. Schmitt, ... Nev. ....., 81 P. 2d 1070; Id., ... Nev. ....., 83 P. 2d 464.''

In the opinion the court says that in these cases ''The question was not involved, decided, considered or discussed.''

It is upon the foregoing postulate that this court had recourse to the rule of *Ticonic National Bank v. Sprague.*

It may be conceded that there is no Nevada decision specifically holding that, under Section 53 of the Nevada Bank Act of 1911, after the bank examiner takes possession of a bank, no person knowing of such taking shall have a lien or charge for any liability

thereafter incurred, for the simple reason that such is the plain meaning of the statute.

But there is a Nevada decision which squarely holds that interest constitutes no part of the original demand and it therefore follows that the interest on the Reno National bank loan was "thereafter incurred" and comes directly under the provisions of the statute.

The case of State v. Parkinson (cited in appellant's opening brief, pages 44 and 45), 5 Nevada, 15, at page 28 holds that "interest constitutes no part of the original demand; it is simply a statutory allowance for delay."

Furthermore we submit that before this court should say "There is, apparently, no pertinent Nevada decision," and thus dismiss the question for the purpose of resorting to federal decisions, this court should recognize that there is a Nevada statute on the question and interpret or construe the same. We find no attempt by this court, before taking the easier way, to draw a line of distinction between the incurring of a charge or liability and the original contract to discharge it if and when it is incurred. A liability for interest is incurred when it is earned. Certainly it is not incurred before it is earned.

For the purpose of assisting this court to interpret the Nevada statute appellant in the reply brief, page 4, quoted from the *City of Louisville v. Fidelity & Columbia Trust Co.* 54 S.W. (2) 40, 245 Ky. 704, and on page 5 from *Bank of Indian Territory v. Eccles,* 91 P. 695-697.

The opinion also states:

> "Appellant does not challenge the validity of Lyon Bank's note or of the pledges securing it."

If the court will refer to paragraph II of the answer (Tr. p. 24) it will be observed that the Reno Bank alleged that the securities in question were hypothecated "to secure the payment of said note." Paragraph II of our reply (Tr. p. 29) reads: "Complainant denies the matters in paragraph II." furthermore, there is nothing whatever in the record to indicate that the securities were pledged for the payment of the $60,500. note, and we have at all times denied that the securities were pledged for the payment of this note and in our briefs we have argued that they were not so pledged.

The opinion further states:

> "Appellant concedes that Reno Bank and appellee, as its receiver, could lawfully apply the proceeds and avails of the pledged collateral to the payment of the principal ($59,543.64) and accrued interest ($605) which were due and owing on the note when the examiner took possession of Lyon Bank's property and business on February 16, 1932."

We have not conceded this except under the theory that interest accruing after July 22, 1931, was a liability thereafter incurred, and we have at all times strenuously argued that, if the court should hold that such accruing interest was not a "liability thereafter incurred," then the securities were pledged merely for the payment of the "present indebtedness" of the

Lyon Bank to the Reno Bank on July 22, 1931, which could only include interest computed to that date.

There is no doubt in our mind that under the law of this state, as declared by our supreme court (State v. Parkinson, 5 Nev. 15) and by legislative enactment (Sec. 53 of the Nevada Bank Act of 1911, N.C.L. 702), the interest on the $60,500 note which accrued after July 22, 1931, was a liability thereafter incurred and that any lien for such interest as might have accrued after February 16, 1932, was absolutely barred.

Our Supreme Court, in *State v. Parkinson,* supra, stated unequivocally and unqualifiedly as follows:

> "Interest constitutes no part of the original demand; it is simply a statutory allowance for delay."

In other words, when the delay occurs the liability is incurred. However, this court has not seen fit to recognize the rule laid down by our supreme court, but states that Section 53 of the Banking Act does not apply because "the liability was incurred long before the examiner took possession" and "no part of it was incurred thereafter." While we emphatically disagree with this conclusion, nevertheless, by so holding, this court is absolutely limited by the terms of the contract to finding that the securities were pledged solely for the "present indebtedness" of the Lyon Bank to the Reno Bank as of July 22, 1931. The court then apparently disposes of this feature by saying: "The pledges were made expressly to secure all indebtedness of Lyon Bank to Reno Bank." This of

course cannot follow nor be true, but upon this premise the court, without so stating, decides that "present indebtedness" included interest as well as principal, and interest accruing after February 16, 1932, as well as that accruing previously.

If the court feels that the term "present indebtedness" can be given such a broad construction (and we know of no prior authority therefor), why was it deemed advisable to state that "the pledges were made expressly to secure all indebtedness of Lyon Bank to Reno Bank;" it will be noted that the vital word "present" was omitted.

At present it is impossible for us to reconcile the decision of this court that "no part of it (indebtedness based upon accruing interest) was incurred thereafter" with the holding of our own supreme court that "interest * * * it simply a statutory allowance for delay." Nor can we reconcile this court's holding that the liability for interest accruing after February 16, 1932, was incurred "long before the examiner took possession (undoubtedly meaning by the signing of the note on July 1, 1931)" with our own supreme court's holding that "interest constitutes no part of the original demand."

In addition to the objection that the court forsook the Nevada law without making an attempt to apply it, and took recourse to the federal decisions, appellant represents that the court failed to give due consideration to the objection made to the so-called revisions and reallocations made in the instant account.

The opinion declares:

> "The total amount due on Lyon Bank's note on February 16, 1932, plus interest subsequently accruing thereon, exceeded the total amount collected by Reno Bank and appellee. This is true even though all sums collected were, or may be deemed to have been, applied to the payment of principal until all principal was paid. Therefore, we need not consider appellant's contention that certain payments which appellee treated as payments of interest should have been treated as payments of principal."

In other words the revision is immaterial and harmless. As a fact the revision works grievous harm and actual monetary loss to the appellant. The receiver's witness Butler (auditor) testified in response to a question by the trial court:

> "On the original manner in which the amounts were applied there is a balance due on the Lyon County Bank note, of one dollar principal and $6825.47 interest,—and on the revised application there is due $9318.94 (principal) and interest from October 21, 1936." (Tr. p. 114.)

It will be borne in mind that the Reno bank held certain securities of the Lyon Bank consisting of bonds and notes, many of the latter secured by mortgage in connection with their loan; we will term these underlying securities or collateral. It collected payments from the makers from time to time and credited such payments upon these securities and simultaneously credited a corresponding payment upon the principal note of $60,500; i.e. when the payment was

credited upon the principal of the underlying security a similar amount was credited upon the principal of the $60,500 note. The Reno Bank generally credited the major portion of the payments upon the principal of the underlying securities and likewise credited a similar payment upon the principal of the main note due it thereby reducing in every instance the principal of the underlying obligations and carrying charges and also the principal of the $60,500 obligation and carrying charges. (The amount credited to interest during the period from February 16, 1932, until October 21, 1936, exceeded the amount of interest which accrued and was collected upon the underlying securities during that period of time.) As a result of these original credits upon the underlying securities and the principal note on October 21, 1936, there remained due, in accordance with the books of the Reno Bank and its advices to the Lyon Bank, the sum of $1 unpaid upon the principal and $6825.47 unpaid interest upon the note for $60,500. These amounts reflected the credits and settlement made by the Reno bank with the holders of the underlying securities. (Tr. p. 114.)

After October 21, 1936, the Reno Bank made a so-called revision of the credits in which instead of crediting largely the payments upon the principal of underlying securities and in each instance with a similar credit upon the main obligation of $60,500, it applied the payments to the discharge of the interest and thereafter to the payment of principal. The result of the revision is shown by the testimony of

the auditor of the Reno Bank (Tr. p. 114) to be that on October 21, 1936, the Lyon Bank owed the Reno Bank $9316.94 upon the principal (while the original figures were $1 upon the principal as of October 21, 1936, and $6825.47 accumulated and unpaid interest). The principal balance as of October 21, 1936, being $1 under the original credits given, and $9,316.94 under the so-called revision. Unpaid principal bears interest; interest cannot be compounded in Nevada.

Based upon these figures of the Reno Bank the so-called revision results in an actual minimum loss to the Lyon Bank of $2490.47.

It will be remembered that the Reno bank held these underlying securities and that these securities were settled and liquidated upon the basis of the original credits made by the Reno Bank and then the notes and securities were delivered to the makers. When any payment made upon underlying securities was credited upon principal of underlying securities a similar credit upon principal of the main security of $60,500 was given. It will easily be seen that if the payments as made were credited upon accumulated interest (as the revision does) instead of principal as originally followed by the Reno Bank then the Lyon Bank would suffer by the revision of credit, and the makers of the original underlying securities would receive the benefit. This method of crediting upon the underlying securities and reflecting similar credits upon the principal note of $60,500 is well illustrated in the Carter case. (Tr. p. 109.) The Reno Bank settled the balance of the Carter note for $873.05 but

under the revision the Reno Bank says the actual amount due upon the Carter note at the date of settlement under the new theory was $1625.99. The Carter note was returned to the makers by the Reno Bank and now the Lyon Bank must pay the difference between $1625.99 and $873.05 to the Reno Bank. It will readily be seen that if the methods finally adopted by the Reno Bank had been originally followed by it on the Carter note the sum of $1625.99 would have been collected from Carter as a final balance instead of $873.05 and that now the Lyon Bank must actually pay to the Reno Bank the difference which amounts to $752.94. Other securities were likewise liquidated and settled by the Reno Bank according to Mr. Tobin, receiver, and in order to build up the principal balance as shown by the revision the credits and amounts were changed long after the securities were returned to the makers. (Tr. pp. 107-8.) In each instance the Lyon Bank, if this revision is proper, must now pay the amount added by this revision and it cannot look to the underlying securities held by the Reno Bank, as the Reno Bank has settled the same and put them beyond the reach of the Lyon Bank. According to the figures of the Reno Bank the actual minimum loss suffered by the Lyon Bank is $2490.47 as of October 21, 1936.

The Lyon Bank adopted the original method followed by the Reno Bank and it has always opposed the revision. It therefore is beyond controversy that the Lyon Bank, a small country bank, which will pay less than fifty cents on the dollar to its creditors, is

vitally injured by this so-called revision through moneys which have been lost to it (assuming that the revision had some substance of right) by the actions and acts of the Reno Bank.

We further submit that payments made and credited cannot be changed except by the mutual consent of the parties. (Appellant's Opening Brief pp. 56-63 inc.)

Attention is also called to the fact that in the final findings of the trial court (Tr. p. 59) no reference is made to a surrender or accounting for the collaterals for which the credits are responsible. In the complainant's proposed findings (Tr. p. 137) we asked for the return of the Wedertz notes amounting to "$2296.90 or thereabouts" (correct $2246.90). If these are not ordered returned they should be ordered accounted for.

The pertinency of these observations lies in the fact that the original suit was begun by the successors to the state bank not against the national bank as an insolvent, but as a creditor and trustee. The judgment is that the complainant take nothing. But the findings will be a perpetual memorial and establish the fact that certain matters were actually litigated and determined, and this determination will harass the Lyon Bank in its subsequent working out of the contractual relation involved and no doubt be considered as final.

The statement in this court's opinion that the revision is immaterial or, as suggested during the oral

argument that it is of advantage to the Lyon Bank, is not correct because the figures—the ultimate result—show a spread of consequence to the great loss to appellant.

In conclusion we submit:

(1) That the securities in question were not pledged for the payment of the promissory note of July 1, 1931, but were expressly pledged for (a) the "present indebtedness" of the Lyon Bank to the Reno Bank on July 22, 1931, and (b) all of the future indebtedness to the Reno Bank which the Lyon Bank might thereafter incur;

(2) That this court cannot properly say that after-accruing interest is not a "liability thereafter incurred," in the face of our supreme court's holding that interest "is simply a statutory allowance for delay";

(3) That, if after-accruing interest constitutes a "liability thereafter incurred," it is barred by Section 53 of the Banking Act from and after February 16, 1932;

(4) That this court cannot properly say that after-accruing interest was a part of the "present indebtedness" of the Lyon Bank to the Reno Bank on July 22, 1931, in the face of our supreme court's holding that "interest constitutes no part of the original demand";

(5) That, if this court is correct in holding that subsequently-accruing interest is not a "liability thereafter incurred," then absolutely the only func-

tion of the promissory note of July 1, 1931, in this litigation is for use in ascertaining the "present indebtedness" of the Lyon Bank to the Reno Bank on July 22, 1931;

(6) That under the express holding of our supreme court the interest for which the Reno bank receiver may claim a lien against the pledged collateral must cease on February 16, 1932, and, if, as held by this court, subsequently-accruing interest is not a "liability thereafter incurred," then the interest for which the Reno Bank receiver may claim a lien against the pledged collateral must cease on July 22, 1931;

(7) That we consider it a matter of right on our part as counsel to take exception to the court's statement of our position in this litigation;

(8) That we consider it a matter of right on the part of the appellant that its status be determined strictly according to the terms of the collateral agreements dated July 22, 1931;

(9) That we consider that this court should quote in its final decision the hereinabove-quoted portion of the decision of our supreme court in *State v. Parkinson,* supra, and which was set out and emphasized in our brief and that this court should explain why such a holding of our supreme court is not controlled in this case;

(10) That the so-called revision of credits changed the position and status of the parties and that it causes an actual monetary loss to appellant due to the actions of the respondent. That respondent vol-

untarily adopted a method of credits upon underlying and the principal security and to allow a change to the so-called "revision" injures appellant entirely as the result of the acts of respondent.

Dated, Carson City, Nevada,
July 7, 1939.

Respectfully submitted,
A. L. HAIGHT,
GEORGE L. SANFORD,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL

I do hereby certify that I am of counsel for the appellant in the foregoing entitled cause and that in my judgment the foregoing petition for rehearing and stay of mandate is well founded and that it is not interposed for delay.

Dated, Carson City, Nevada,
July 7, 1939.

GEORGE L. SANFORD,
Of Counsel for Appellant and Petitioner.